



Excise Tax Advisory

Excise Tax Advisories are interpretive statements authorized by RCW 34.05.230.

ETA XXXX.20XX

Issue Date:

When is the business and occupation tax preempted on sales of tangible personal property by non-Indians in Indian country?

Purpose & Scope

The purpose of this ETA is to eliminate confusion about the application of WAC 458-20-192(7)(b)(i), *Indians—Indian country, Nonmembers in Indian country – preemption of state tax, Preemption of B&O and public utility tax – sales of tangible personal property or provision of services by nonmembers in Indian country, Sales of tangible personal property* (Rule 192(7)(b)(i)). Non-Indian sellers delivering goods to tribes and tribal members in their Indian country are finding it difficult to determine when Washington's business and occupation tax is due on receipts from these sales.

State Authority over non-Indians in Indian Country

Persons doing business with Indians in Indian Country are subject to unique federal laws and, depending on the facts, may not be subject to state and local taxes. This ETA describes the basis for this tax treatment and provides fact patterns to use as guidance in applying the law.

- Indians and tribes have immunity from almost all state taxes while in their Indian country.
- Non-Indians doing business with non-Indians in Indian Country must pay state and local taxes. However, when doing business with Indians in Indian Country, non-Indians might not be subject to state and local taxes, depending on the facts surrounding the activity in question.

WAC 458-20-192(7)(b)(i) addresses the federal preemption test in the context of Washington's B&O tax on sales of tangible personal property. Federal preemption of B&O tax on the sales of services is addressed in Rule 192(7)(b)(ii).

To inquire about the availability of this document in an alternate format for the visually impaired, please call (360)705-6715. Teletype (TTY) users please call 1-800-451-7985.

If you have questions regarding your tax-reporting responsibilities:

- Visit our website at dor.wa.gov;
- Send an email to communications@dor.wa.gov;
- or
- Call the Department's Telephone Information Center at 1-800-647-7706.

**What is
required for
exemption**

Income from a sale of tangible personal property to a tribe, tribal entity, or tribal member in the tribe's Indian country is not subject to B&O tax if the sale meets the following requirements.

1. The tangible personal property is delivered to the buyer in Indian country; and
2. The seller has a physical presence in Indian country independent of mere delivery. This physical presence can be satisfied by the seller or by an agent for the seller, such as a sales representative, but not by a common carrier deliverer. This presence is indicated by any one of the following:
 - A. The property is located in Indian country at the time of sale, which means:
 - a) The seller delivers the goods to the tribal buyer from a stock of goods maintained in Indian country; or
 - b) The seller delivers the goods to the tribal buyer at the time of the sale (the buyer pays the seller or the seller's agent in Indian country for the goods by cash or cash equivalent at the same time as the goods are delivered).
 - B. The seller has a branch office, outlet, or place of business in Indian country that is used to receive the order or distribute the property, which means:
 - a) The place of business must be an office, warehouse, trailer, desk, counter, or other place where business is regularly transacted during regular business hours.
 - b) A post office box or desk space where sales may be made on an *ad hoc* basis is not enough.
 - C. The sale of the property is solicited by the seller while the seller is in Indian country, which means:
 - a) The seller or the seller's agent takes the order for the goods while physically present in Indian country;
 - b) The seller or the seller's agent negotiates and executes the contract for purchase of the goods while physically present in Indian country;
 - c) The seller or the seller's agent negotiates and executes, while physically present in Indian country, a "master contract," under which businesses contract for the purchase and sale of an indeterminate amount of goods at an agreed upon price for an agreed upon period of time; or
 - d) The seller or the seller's agent, not a common carrier, makes the goods available for selection and purchase from a truck or other vehicle transporting a store of the seller's goods while the vehicle is in Indian country.

Examples

- A non-Indian seller makes regular sales of pet supplies to a tribally owned convenience store located in the tribe's Indian country. The seller's place of business is located outside of the tribe's Indian country. The store manager orders the goods through the seller's website and pays electronically with the store's credit card. The goods are shipped to the store by UPS. This sale is not exempt, because although the goods are delivered to a tribal buyer in the tribe's Indian country, the

seller has no physical presence in Indian country.

- A non-Indian seller makes regular sales of pet supplies to a tribally owned convenience store located in the tribe's Indian country. The seller's place of business is located outside of the tribe's Indian country. The seller's sales representative takes the order from the store manager at the store. Payment may be made when the order is taken, or the store may be billed after the goods are shipped. The goods are shipped to the store by UPS. This sale is exempt, because the goods are delivered to a tribal buyer in the tribe's Indian country and the seller's physical presence is established by the solicitation of the sale in the tribe's Indian country.
- A non-Indian seller makes regular sales of pet supplies to a tribally owned convenience store located in the tribe's Indian country. The seller's office and warehouse are located within the tribe's Indian country, and orders may be taken in person, by phone, or by e-mail. The goods may be picked up at the seller's warehouse, or they may be delivered to the store. Payment may be made when the order is taken, or the store may be billed after the goods are delivered. This sale is exempt because the goods are delivered to the tribal buyer in the tribe's Indian country and the seller's physical presence is established by the location of the seller's place of business within the tribe's Indian country.
- A non-Indian seller makes regular sales of pet supplies to a tribally owned convenience store located in the tribe's Indian country. The seller's place of business is located outside of the tribe's Indian country. The store manager orders the goods through the seller's website. The seller's sales representative delivers the goods to the store and receives payment for the goods by check at the time of delivery. This sale is exempt because the goods are delivered to the tribal buyer in the tribe's Indian country and the seller's physical presence is established by the presence of the goods in the tribe's Indian country at the time of sale.

**Indian Tax
Guide**

For additional information, please see the Department's Indian Tax Guide at <http://dor.wa.gov/Content/FindTaxesAndRates/RetailSalesTax/Indians/IndianTaxGuide/default.aspx>
